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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 795

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Petitioners,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation; and YAMPA VALLEY ELECTRIC ASSOCIATION, INC., a Colorado corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Rules 4

When Federal Questions Raised 6

Reasons for Granting the Writ 7

Conclusion 7

Appendix A:

Opinion of the Supreme Court of Colorado..... 8

Appendix B:

Constitutional Provisions and Rules 21

Appendix C:

Portions of the Record Showing When Federal Questions Raised 24

CASES CITED

Alexander v. Morrison-Knudsen Company, 444 P.2d 397 (Colo. 1968) 1, 6

Tele-Views News Company v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (D.C. E.D. Pa. 1961)..... 3

INDEX (CONTINUED)

PAGE

CITATIONS

United States Constitution:

Amendment 5 4

Amendment 14 4

Federal Rules of Civil Procedure:

F.R.Civ.P. 12(b)(6) 3, 4, 5

F.R.Civ.P. 41(a)(1) 2, 3, 4, 5, 6, 7

F.R.Civ.P. 41(a)(2) 2, 4, 5, 6

F.R.Civ.P. 56 ..... 3, 4, 5

Colorado Rules of Civil Procedure:

Colo.R.Civ.P. 12(b)(5) 3, 4, 5

Colo.R.Civ.P. 41(a)(1) 2, 3, 4, 5, 6

Colo.R.Civ.P. 41(a)(2) 4

Colo.R.Civ.P. 56 ..... 3, 4, 5

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Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado entered in the above-entitled case on September 9, 1968.

Citations to Opinions Below

The opinion of the Supreme Court of Colorado is *Alexander v. Morrison-Knudsen Company*, 444 P. 2d 397 (Colo 1968). As yet the opinion has not been printed in the official *Colorado Reports*. A copy of this opinion is printed in Appendix A.

Jurisdiction

The opinion of the Supreme Court of Colorado was dated June 17, 1968. Judgment was entered and rehearing was denied on September 9, 1968. No order granting any extension of time within which to petition for certiorari has been entered. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(3).

Questions Presented

1. Whether the Supreme Court of Colorado may dismiss the petitioners' action with prejudice pursuant to *F.R.Civ.P.* 41(a)(1) and *Colo.R.Civ.P.* 41(a)(1) [the double dismissal rule] if the dismissal in the United States District Court for the District of Colorado was pursuant to *F.R.Civ.P.* 41(a)(2) or was a confession of a motion to dismiss and even though the action in the United States District Court for the District of Colorado is still pending.

2. Whether the putative dismissal in the United States District Court for the District of Colorado was (a) a *F.R.Civ.P* 41(a)(1) dismissal, (b) a *F.R.Civ.P.* 41(a)(2) dismissal, or (c) confession of a motions to dismiss filed in the United States District Court for the District of Colorado by respondents. [In those motions to dismiss, the respondents correctly told the United States District Court for the District of Colorado and the petitioners that the United States District Court lacked jurisdiction because there was not complete diversity of citizenship.]

3. *Whether a confession of motions to dismiss or a dismissal pursuant to* F.R.Civ.P. *41(a)(1) or pursuant to* F.R.Civ.P. *41(a)(2), as the case may be, is within the*

double dismissal rule when there never was any jurisdiction in the United States District Court for the District of Colorado.

4. Whether the Supreme Court of Colorado had jurisdiction to rule on the effect of a putative dismissal in the United States District Court for the District of Colorado, and if so, whether the Supreme Court of Colorado was correct in ruling that the United States District Court did have jurisdiction based on diversity of citizenship.

5. Whether application of the double dismissal rule in the circumstances of this case, denying the petitioners any opportunity for a trial on the merits, violates the concept of due process of law guaranteed by the Fifth and Fourteenth Amendments to the *United States Constitution.*

6. Whether the double dismissal rule in *F.R.Civ.P.* 41(a)(1) has the same meaning as the double dismissal rule in *Colo.R.Civ.P.* 41(a)(1)—specifically, whether both *F.R.Civ.P.* 41(a)(1) and *Colo.R.Civ.P.* 41(a)(1), which are not in the same language, apply to a situtation of one dismissal in a state court and one dismissal in a federal court.

7. Whether the respondents' filing of motions pursuant to *F.R.Civ.P.* 12(b)(6) and *Colo.R.Civ.P.* 12(b)(5), which in effect were motions for summary judgment pursuant to *F.R.Civ.P.* 56(b) and *Colo.R.Civ.P.* 56(b), obviated the effect of the double dismissal rule, as held in *Tele-Views News Company v. S.R.B. TV Publishing Co.*, 28 F.R.D. 303 (D.C. E.D. Pa. 1961).

Constitutional Provisions and Rules

The constitutional provisions involved are *U.S.Const.* Amend. 5 and *U.S.Const.* Amend. 14. The federal rules involved are *F.R.Civ.P.* 41(a)(1), *F.R.Civ.P.* 41(a)(2), *F.R.Civ.P.* 12(b)(6), and *F.R.Civ.P.* 56(b). The Colorado rules involved are *Colo.R.Civ.P.* 41(a)(1), *Colo.R.Civ.P.* 41(a)(2), *Colo.R.Civ.P.* 12(b)(5), and *Colo.R.Civ.P.* 56(b). These constitutional provisions, federal rules, and Colorado rules are printed in Appendix B.

Statement

The petitioner Lewis M. Alexander suffered the amputation of both legs and one arm at the shoulder and other severe injuries by electrocution [4-6].*

On May 14, 1964, the petitioner Lewis M. Alexander and his wife, the petitioner Ruth M. Alexander, filed a negligence action against respondents, Morrison-Knudsen Company, Inc., Colorado-Ute Electric Association, Inc., and Yampa Valley Electric Association, Inc., in the District Court for the City and County of Denver, State of Colorado [1-16]. On December 8, 1964, the petitioners pursuant to *Colo.R.Civ.P.* 41(a)(1) filed a notice of dismissal in the District Court for the City and County of Denver [81-82]; and on December 10, 1964, the petitioners filed their complaint against respondents in the United States District Court for the District of Colorado [110-126]. In both the District Court for the City and County of Denver and the United States District Court for the District of Colorado, the respondents Morrison-Knudsen Company, Inc., and Colorado-Ute Electric Association, Inc., filed mo-

*Numbers in brackets [ ] are folio numbers from the record.

tions to dismiss pursuant to *F.R.Civ.P.* 12(b)(6) and *Colo. R.Civ.P.* 12(b)(5) [30-42, 43-45, 294-307]; one of these motions being supported by affidavits [69-80, 309-320], it was in effect a motion for summary judgment pursuant to *F.R.Civ.P.* 56(b) and *Colo.R.Civ.P.* 56(b). On January 6, 1965, the respondents Yampa Valley Electric Association, Inc., and Colorado-Ute Electric Association, Inc., filed motions to dismiss in the United States District Court on the ground that the United States District Court lacked jurisdiction, informing the Court and the petitioners that there was not complete diversity of citizenship [321-323, 330-332]. Convinced by these motions that there was not complete diversity of citizenship and that, therefore, the United States District Court had no jurisdiction, the petitioners filed a motion to dismiss [127-129], which they meant to be a *F.R.Civ.P.* 41(a)(2) motion but which they inartfully entitled "Voluntary Dismissal Without Prejudice Under Rule 41(a)(1)," thus confessing Yampa Valley Electric Association, Inc.'s and Colorado-Ute Electric Association, Inc.'s motions to dismiss.

At this juncture, the respondents invoked the double dismissal rule and moved to dismiss in both the District Court for the County of Routt, State of Colorado [the District Court for the City and County of Denver had granted a motion for change of venue to the District Court for the County of Routt] and in the United States District Court for the District of Colorado [105-109, 351-357]. The District Court for the County of Routt granted the motion to dismiss on the ground of the double dismissal rule, *F.R.Civ.P.* 41(a)(1) and *Colo.R.Civ.P.* 41(a)(1) [259-273, 228-233]. The petitioners then perfected their writ of error in the Supreme Court of Colorado. Meanwhile, the United States District Court invoked the doctrine of abstention pending the decision of the Supreme Court of Colorado

[333-341]; the United States District Court never ruled on the questions whether diversity of citizenship existed, whether it had jurisdiction, and whether the putative dismissal in the Court was a *F.R.Civ.P.* 41(a)(1) dismissal, a *F.R.Civ.P.* 41(a)(2) dismissal, or a confession of the motion to dismiss. In *Alexander v. Morrison-Knudsen Company,* 444 P. 2d 397 (Colo. 1968), the Supreme Court of Colorado decided that *F.R.Civ.P.* 41(a)(1) and *Colo.R.-Civ.P.* 41(a)(1) dismissals had occurred not only in the District Court for the City and County of Denver but also in the United States District Court for the District of Colorado [339-446].

The result of this decision, if upheld, is that the petitioner Lewis M. Alexander, who lost both legs and one arm, will never have an opportunity to present his claim for damages to any jury in any court.

When Federal Questions Raised

The federal questions were raised: (1) in the District Court for the County of Routt, State of Colorado, on the respondents' motion to dismiss, (2) in the District Court for the County of Routt on the petitioners' motion for rehearing, (3) in the Supreme Court by opening brief and reply brief, and (4) in the United States District Court for the District of Colorado or the respondents' motions to dismiss and on petitioner's Motion to Vacate or Set Aside Plaintiffs' Dismissal under Rule 41(a)(1) Previously Filed Herein, and to Dismiss the Case on Defendants' Motion to Dismiss for Lack of Jurisdiction due to Lack of Diversity. Portions of the record here relied upon are printed in Appendix C.

Reasons for Granting the Writ

The Supreme Court of Colorado in this case has decided federal questions of substance not heretofore determined by this Court. Specifically, the United States Supreme Court has never decided any case on the application of the double dismissal rule, *F.R.Civ.P.* 41(a)(1). No court in the nation, other than the Supreme Court of Colorado, either state or federal, has ever held that the double dismissal rule applies when one of the putative dismissals was in a federal court that lacked jurisdiction for want of diversity.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF COLORADO

No. 22018

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs in Error,

v

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation, COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation, and YAMPA VALLEY ELECTRIC ASSOCIATION, INC., a Colorado corporation,
Defendants in Error.

Error to the District Court of Routt County
Honorable Addison M. Gooding, Judge

IN DEPARTMENT JUDGMENT AFFIRMED

Walter L. Gerash, John S. Carroll, E. Michael Canges, Earl S. Wylder, Attorneys for Plaintiffs in Error.

Harold Clark Thompson, Alious Rockett, Francis L. Bury, Feay B. Smith, Jr., Attorneys for Defendant in Error Morrison-Knudsen Company, Inc.

Shivers, Banta and McMartin, John J. Conway, John A. Hughes, Attorneys for Defendant in Error Colorado-Ute Electric Association, Inc.

Duane O. Littell, Ronald C. Hill, Marvin L. Brown, Attorneys for Defendant in Error Yampa Valley Electric Association, Inc.

Opinion by MR. JUSTICE KELLEY

This case is here on writ of error directed to a judgment of dismissal entered by the District Court of Routt County. The parties appear in the same relative position as they appeared in the trial court.

Sometime prior to May 27, 1963, Morrison-Knudsen contracted with Colorado-Ute Electric Association, Inc. (Colorado-Ute), to construct an electric power plant (the project) near Hayden, Routt County, Colorado.

The plaintiff Lewis Alexander, a crane operator employed by Morrison-Knudsen, was seriously injured on May 27, 1963, in the course of his employment on the project. His injuries constitute the basis for the damages claimed in the first claim of the complaint. In a second claim for relief, Ruth, wife of Lewis, claimed damages for loss of consortium caused by the injuries suffered by her husband. The defendants will be referred to collectively or by given name. It should be noted that this is not a workmen's compensation case, but a claim for damages, based upon negligence.

According to the plaintiffs' complaint, the site of the accident was in Routt County on premises owned by Colorado-Ute and Yampa Valley Electric Association, Inc. (Yampa Valley), and the cause of the injuries complained of was an uninsulated high voltage electric power line owned and operated by Colorado-Ute and Yampa Valley, from which an electric charge leaped to the boom of the crane being operated by the plaintiff Lewis Alexander. It is not necessary to elaborate on the facts relating to the accident and the injuries because of the peculiar posture of the proceedings.

The judgment to which the writ of error is directed

was entered by the District Court of Routt County on August 16, 1965, and in material part states:

> "That defendants' Motion for Summary judgment filed with the Court on the 12th day of May, 1965, is granted and the plaintiffs' complaint is dismissed, with prejudice;
>
> "Even though it may not be necessary to rule thereon, it is further ordered that the motion to dismiss of Morrison-Knudsen Company, Inc., a Delaware corporation, is granted; and the motion to dismiss of Colorado-Ute Electric Association, Inc., a Colorado corporation, is granted;
>
> "It is further ordered that plaintiffs' motion to set aside or vacate attempted voluntary dismissal is denied."

It is necessary to consider separately the correctness of the judgment as it relates to each defendant, because of the difference in the relationships between the several defendants and the plaintiffs and because of the variety of motions and pleadings directed to the complaint.

Morrison-Knudsen

Morrison-Knudsen is a general contractor standing in the relationship of employer to the plaintiff Lewis Alexander. It filed a motion to dismiss for failure to state a claim upon which relief can be granted. In support of its motion Morrison-Knudsen filed affidavits to show that Lewis Alexander had not rejected the Workmen's Compensation Act prior to going to work for Morrison-Knudsen; that it had workmen's compensation insurance in effect and was otherwise in conformance with the act. There was no traverse of the allegations as to the rela-

tionship between the parties or as to the compliance by the employer with the Workmen's Compensation Act.

The record as outlined brings into play that part of R.C.P. Colo. 12(b) which provides that:

> "*** If, on a motion asserting the defense *** to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56 ***"

Consequently, the Routt County District Court's order granting Morrison-Knudsen's motion for summary judgment must be affirmed "if the pleadings * * * together with the affidavits * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law * * *." R.C.P. Colo. 56(c); *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P. 2d 866; *Field v. Sisters of Mercy*, 126 Colo. 1, 245 P. 2d 1167. It is clear from the pleadings and the affidavits that the plaintiff Lewis Alexander and Morrison-Knudsen were subject to the Workmen's Compensation Act and that Lewis Alexander's injuries arose "out of and in the course of his employment on May 27, 1963 while working for said Morrison-Knudsen Company * * *," as alleged in the complaint.

Having brought itself within the ambit of the Workmen's Compensation Act, Morrison-Knudsen is not subject to a common law action for damages and the plaintiffs are limited to the remedies specified in the act. This conclusion is spelled out in C.R.S. 1963, 81-3-2, in these words:

> "Any employer who has elected to and has complied with the provisions of this chapter, including the

provisions relating to insurance, shall not be subject to the provisions of section 81-3-1; nor shall such employer be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in this chapter; *and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in this chapter.*" (Emphasis added.)

The plaintiff Ruth Alexander is in no better position than her husband. Her rights under the situation here are strictly derivative and are controlled by the all-inclusive language of the italicized portion of the statute just quoted. In addition to delimiting remedies available to those subject to its provisions, the Workmen's Compensation Act delineates the rights of all dependents of a compensably injured workman, including the wife. See C.R.S. 1963, chapter 81, article 11.

Consequently, the trial court correctly, as a matter of law, dismissed plaintiffs' complaint as to Morrison-Knudsen under the provisions of Rule 56(c).

Colorado-Ute

The complaint alleges that:

"* * * MORRISON-KNUDSEN * * * and *COLORADO-UTE* * * * entered into a written contract whereby MORRISON-KNUDSEN * * * agreed to construct an electric power plant * * *.

* * *

> "* * * MORRISON-KNUDSEN * * * ordered the plaintiff LEWIS M. ALEXANDER to take a truck-mounted crane with a 45-foot boom to remove dirt, brush, and other debris from a site *on premises owned by the COLORADO-UTE ELECTRIC ASSOCIATION, INC.* * * *" (Emphasis added.)

The complaint then alleges numerous acts of negligence attributable to Colorado-Ute, which resulted in the injuries to Lewis Alexander. The plaintiffs contend that "certainly Morrison-Knudsen *and* Colorado-Ute could *not both* be considered the employer of Lewis M. Alexander within the meaning of the statute." Although citing no authority for this position, we will assume for the purpose of this discussion that plaintiffs had in mind *Great Western Sugar Co. v. Erbes,* 148 Colo. 566, 367 P.2d 329, where an employee of a contractor was permitted to recover damages from the owner for injuries sustained while working on the owner's premises. Apparently *Erbes* was noted by the General Assembly inasmuch as it amended C.R.S. '53, 81-9-2. The amended law became effective on April 18, 1963, some five weeks prior to the date of plaintiff's unfortunate accident. C.R.S. 1963, 81-9-2. Under the law as amended, the owner, in circumstances such as we have here, is deemed to be "an employer." It provides that if the contractor or subcontractor undertaking to do work for the owner of property is unable to meet his responsibilities under the act, then those responsibilities devolve upon the owner. *Stewart v. Industrial Commission,* ..... Colo. ....., 428 P. 2d 367. However, if the contractor undertaking to do such work "shall before commencing such work insure and keep insured his liability for compensation," the owner of the property shall be free of responsibility to the injured workman, including tort liability. C.R.S. 1963, 81-9-2(2).

The record here reflects that Morrison-Knudsen before commencing such work insured and kept insured its liability for compensation, as provided in C.R.S. 1963, chapter 81; consequently, Colorado-Ute is not subject to any liability of any kind to the Alexanders.

Yampa Valley

Although alleged to have been a co-owner of the land on which the accident occurred, it does not appear that Yampa Valley "contracted out" the work to Morrison-Knudsen. So, under the state of the pleadings at this point, it is not possible to bring Yampa Valley within the terms of C.R.S. 1963, 81-9-2. More importantly, the judgment under review disposed of plaintiffs' claim against Yampa Valley solely on the basis of the "defendants' Motion for Summary Judgment filed with the Court on the 12th day of May, 1965." The motion of May 12, 1965, relied upon the "double dismissal" provision of Rule 41(a)(1) of the Colorado Rules of Civil Procedure.

Rule 41(a)(1) relates to voluntary dismissals. In pertinent part, it reads:

> "* * * [A]n action may be dismissed * * * without order of court (i) by filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment * * *. Unless otherwise stated in the notice of dismissal * * * the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.*" (Emphasis added.)

The underscored portion is the so-called "double dis-

missal'' rule. The applicability of the rule is a matter of first impression in this jurisdiction. Fortunately our rule, like those of many of our sister states, is copied from the Federal Rules of Civil Procedure. The federal courts and a few state jurisdictions have had occasion to deal with the application of the rule. See *American Cyanamid Co. v. McGhee,* 317 F. 2d 295; *Engelhardt v. Bell & Howell Co.,* 299 F. 2d 480; *Littman v. Bache & Co.,* 252 F. 2d 479; *Thomas v. Braffet's Heirs,* 6 Utah 2d 57, 305 P. 2d 507.

The rule in its terms is relatively simple: An action may be dismissed by notice, without court order, at any time before the adverse party files an answer or motion for summary judgment. But, when a plaintiff has once dismissed, the second dismissal operates as an adjudication on the merits. However simple the rule may be, the problems presented by the state of the record here are somewhat complex and call for some reference to the chronology of the filings by the parties.

On May 14, 1964, the plaintiffs filed their complaint in the District Court in and for the City and County of Denver (Denver District Court); on June 11, 1964, Yampa Valley filed a motion for change of venue to the District Court in and for Routt County, Colorado (Routt County District Court); on October 2, 1964, the motion for change of venue was granted and, at the request of the plaintiffs, the execution of the order was stayed to give them time to file an original proceeding under R.C.P. Colo. 106(a)(4); on October 23, 1964, in Case No. 21512, this court denied plaintiffs' petition for a writ in the nature of prohibition, by which they attempted to set aside the order for change of venue; then, on December 8, 1964, plaintiffs filed a *notice of dismissal* in the Denver District Court, pursuant to Rule 41(a)(1). We must remember that the

notice of dismissal was subsequent to the court's order granting the change of venue.

At the time the *notice* of dismissal was tendered to the Denver District Court, the file in the case had not been transferred to the Routt County District Court.

The plaintiffs contend that, at this juncture,

> "NO VOLUNTARY DISMISSAL BY THE PLAINTIFFS OCCURRED IN THE DISTRICT COURT FOR THE CITY AND COUNTY OF DENVER, AS THE NOTICE OF DISMISSAL WAS FILED *AFTER* THE VENUE CHANGED TO THE ROUTT COUNTY DISTRICT COURT."

Plaintiffs' argument is, in brief, that the court's order changing the venue of the case from Denver to Routt County resulted in its complete surrender of jurisdiction over the cause for all purposes except for certification of the proceedings to the designated venue. *Lamar Alfalfa Milling Co. v. Bishop,* 80 Colo. 369, 250 P. 689; *Christ v. Flannagan,* 23 Colo. 140, 46 P. 683. However, we do not interpret these cases to hold that the case is in limbo. The transferor court, until the certification and actual transfer of the case, has physical control over the files. Under these circumstances, when the defendants' time to answer, for instance, is about to expire, there is little doubt that the clerk of the transferor court could accept the filing of an answer and place it in the file. To argue that the defendant, under such circumstances, was in default because the filing had not been made in the transferee court seems to the author of this opinion to be wholly absurd. Likewise, the filing of a *notice to dismiss* under Rule 41(a)(1), pending the actual transfer of the proceedings to the court of proper venue, is effective. This ruling is not inconsistent

with *Christ v. Flannagan, supra,* nor *Lamar Alfalfa Milling Co. v. Bishop, supra,* because those cases were directed to the power of the court to act after the change of venue order, whereas, in the case of a filing of an answer or of a notice to dismiss the power of the court to act is not invoked. See *Littman v. Bache & Co., supra; Tele-Views News Co. v. S.R.B. TV Publishing Co.,* 28 F.R.D. 303; *Love v. Silas Mason Co.,* 66 F. Supp. 753.

Another problem arising out of the history of the filings relates to the answer which Yampa filed. It actually filed its answer in the Routt County District Court on December 31, 1964. This becomes important in applying the double dismissal rule, because normally the double dismissal rule is not applicable, as we have seen, where an answer or motion for summary justment has been filed by the adverse party. In order to set the scene for our discussion of this point, it is essential to complete the factual statement.

On December 18, 1964, the order for change of venue issued, following the refusal of this court to entertain plaintiffs' original proceedings, and the file was certified by the Denver District Court and sent to the District Court of Routt County.

In the meantime, on December 10, 1964, the plaintiffs filed in the United States District Court for the District of Colorado (Federal Court) substantially the same complaint they had previously filed in the Denver District Court against Yampa (and the two other defendants); Yampa, in response to the federal court complaint, filed a motion to dismiss for lack of jurisdiction over the subject matter "because the controversy is not between citizens of different states."

On January 12, 1965, the plaintiffs filed, in the federal court, a notice of dismissal under Fed. R.Civ. P. 41(a)(1), which stated:

> "Come now the above named Plaintiffs * * * and hereby voluntarily dismiss their Complaint without prejudice as previously filed against all defendants named herein, as no answer or motion for summary judgment has been filed by any of the defendants."

We deem the date on which Yampa filed its anwser (December 31, 1964) material only in relation to the date of the *notice of dismissal* (December 8, 1964) filed in the state court and not to the second one filed in the federal court on January 12, 1965. It is quite obvious that the answer filed in the state court was *after* the first notice of dismissal, and *before* the second notice of dismissal in the federal court. At the time the answer was filed, Yampa Valley could not have anticipated that a notice of dismissal would subsequently be filed in the federal court.

Because the right to invoke the "double dismissal" rule did not arise until after Yampa Valley's answer was filed in the state court, and since the answer was not directed to the federal court complaint, we hold that the filing thereof did not constitute a waiver of Yampa Valley's right to move for dismissal, as it did, on the basis of the rule. Yampa Valley could not invoke the right prior to the filing of the second notice of dismissal because the right did not exist, nor could it logically waive a right prior to the time it came into existence. See *Ewing v. Colorado Farm & Mutual Casualty Co.*, 133 Colo. 447, 269 P. 2d 1040.

The plaintiffs, in another maneuver in the federal court, sought to vacate and set aside the *second* notice of

dismissal. That motion is pending. Plaintiffs contend that because the federal court has not ruled on this motion the Routt County District Court "could not properly determine any federal dismissal."

In this connection, the order of the federal court, dated April 22, 1965, is most interesting, since that court was likewise confronted with the effect of the "double dismissal" rule. After reviewing the contentions of the respective parties, the court, in the preamble of its order, stated, *inter alia*:

> "There appears no necessity for the law of Colorado to be determined secondhand in this particular case, for in the pending state action a Colorado court can determine the Colorado law and its application to the case now before it.
>
> * * *
>
> "For the foregoing reasons the Court called counsel into conference and expressed the Court's feeling that this was a matter in which the doctrine of abstention should be invoked to give the state court an opportunity to determine the question of dismissal or non-dismissal of the state proceedings. *Counsel expressed concurrence.*" (Emphasis added.)

The change of heart which the plaintiffs evidenced by their attempt to vacate and set aside their *second* notice of dismissal has no effect, in our opinion, on the efficacy of the dismissal. The notice, upon filing, accomplished the dismissal of the complaint. As pointed out in *American Cyanamid Company v. McGhee, supra,* the plaintiff

> "* * * [N]eed do no more than file a *notice* of dismissal with the Clerk. That document itself closes the file. * * * [A]nd the court has no role to play. * * *

> There is not even a perfunctory order of court closing the file * * *."

It may seem somewhat incongruous for us to say that the filing of the *notice of dismissal* closes the file and then approve orders of court which were entered subsequently to the *notice.* There may be a modicum of inconsistency in our action, but it is outweighed by practical considerations. Too, with but few exceptions, the cases do not indicate or suggest that, by the filing of the *notice,* the court's jurisdiction immediately terminates for all purposes. We think the court here, in any event, had jurisdiction to do what it did.

It would ill become the plaintiffs to assert the court's lack of jurisdiction at this point because they have filed a motion "for an order setting aside or vacating such dismissal, if any, on the grounds that it was of no effect and on the grounds that justice so requires."

The Routt County District Court properly denied this motion. The alternative would have been for the plaintiffs to have filed a third lawsuit. We see no reason which would justify putting the defendant to additional inconvenience and expense before giving effect to this wholesome rule.

The purpose of the rule is well stated in *Engelhardt v. Bell & Howell Co., supra,* in these words:

> "By the salutary provisions of Rule 41, a plaintiff is given the right to dismiss a first suit at an early stage. Plaintiff may do so without prejudice and with no terms or conditions attached thereto. The rule also, however, protects a defendant by providing that if the plaintiff takes advantage of his right of early dis-

missal on one occasion, he may not repeat the process with impunity. If he wishes to escape the effect of the two dismissal rule, he is required then to obtain a dismissal by the court under (a)(2), 'upon such terms and conditions as the court deems proper.' "

Also, see 5 J. Moore, Federal Practice §41.02 (2d ed. 1967).

The judgment is affirmed.

MR. CHIEF JUSTICE MOORE and MR. JUSTICE HODGES concur.

MR. JUSTICE DAY concurs in the result.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND RULES

U.S.Const. Amend 5:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

U.S.Const. Amend. 14:

"No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

F.R.Civ.P. 41(a)(1):

"Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before

service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

F.R.Civ.P. 41(a)(2):

"Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

F.R.Civ.P. 12(b)(6):

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted. . . ."

F.R.Civ.P. 56(b):

> "A party against whom a claim, counterclaim, or cross-claim, is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

Colo.R.Civ.P. 41(a)(1):

> "Subject to the provisions of rule 23(c), of rule 66, and of any statute, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim."

Colo.R.Civ.P. 41(a)(2):

> "Except as provided in paragraph (1) of this subdivision, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the

court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Colo.R.Civ.P. 12(b)(5):

"Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... failure to state a claim upon which relief can be granted."

Colo.R.Civ.P. 56(b):

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

APPENDIX C

PORTIONS OF THE RECORD SHOWING WHEN FEDERAL QUESTIONS RAISED

(1) Transcript of Proceedings in the District Court for the County of Routt, State of Colorado, on August 16, 1965:

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF ROUTT
STATE OF COLORADO

No. 3741

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs,

vs.

MORRISON-KNUDSEN CO., et al, *defendants.*

TRANSCRIPT OF PROCEEDINGS

THIS MATTER, coming on regularly for hearing on the 16th day of AUGUST, 1965, at 10:00 o'clock a.m., before The Honorable Addison M. Gooding, in the District Court Room, Steamboat Springs, Routt County, Colorado. (Argument on Motion for Dismissal)

THE COURT: Ruling will be reserved on this Motion until the submission of the other Motions.

MR. THOMPSON: We filed two motions shortly after filing of the complaint and service of summons. One was a motion to dismiss on the ground that the action was barred under the Workmen's Compensation Act of Colorado, and then we also filed a Motion to strike a paragraph from the Complaint which alleged that our client, Morrison-Knudsen had agreed to save Colorado Ute Electric harmless on account of any Judgments they might have rendered against them by employees of the Morrison-Knudsen Company. (Argument)

THE COURT: Well, this is like so many cases with a ten or fifteen pound file. If you look through the fustian, the sound and the fury to the actual issues involved, it is relatively simple and I think this is true in this case. There are only the two issues involved, I believe: first, the double dismissal and the effect thereof. 41(a)(1) is that a dismissal operates as an adjudication upon the merits

when filed by a plaintiff who has once dismissed in any Court. It doesn't say a State Court; it doesn't say the District Court of Denver or the Federal District Court in Denver. It is a dismissal in any Court. Now, we have two dismissals here and it is something more than a technicality. The defendants should not be beset and haunted with dismissals and reinstatements and I think that is true in this case as in any other, so I believe Mr. Littell's motion to dismiss because of the two dismissals is sound and well taken and will be granted.

I am going to rule on the other motion, even though it may be dictum, having decided that the case has been adjudicated upon the merits by procedure then what I might say following that could be called surplusage and useless. Well, the Courts like dictum; they indulge in dictum in this Court along with others. I am about to do this in the present case although there is a distinction there. The fact is the defendants, all of them, seek a dismissal of the action and it so happens that the grounds available to the several defendants are not necessarily the same grounds as might be available to other defendants, but that is a question for the Court should the action be dismissed. The Statute is constitutional in my opinion beyond a doubt. It is the Workmen's Compensation Law which has served a salutory purpose for at least thirty-five years I should say, perhaps longer, and so firmly engrained in the Law and in the justice and the administration of the Law in the State of Colorado and the rights and privileges and duties and liabilities of employer and employees, even though I felt it was unconstitutional (as I do not, let that be understood), I would hesitate very long and very seriously before I would strike it down because it hasn't reached that point yet. It will soon reach the point where it is the law of the State so long that the memory of man

runneth not to the contrary, so all Motions will be granted except the Motion to withdraw and nullify and set aside the second dismissal, whichever it was, in the Denver District Court or the United States District Court, if there is such a Motion here, I believe. That Motion will be denied. The other motions will be granted and I will call upon counsel for the defendants to prepare form of Order and include therein what you think should be, but no more. I believe Findings are not required. I think that is specifically provided in the Rules that Findings on a Motion, including a Motion such as this are not required. If you have a different idea and you want Findings, why put them in and I will consider them. Upon the final conclusion if I think they should not be there I will strike them out. How long do you want, gentlemen? I believe counsel for the several defendants can collaborate on the Order so that one Order will be all we need. Can you do it within ten days?

MR. LITTELL: Ten days is ample.

THE COURT: You can have ten days. Mr. Gerash?

MR. GERASH: Yes. As I take it, to clarify the Court is finding this even though the Court did find they filed Summary Judgment motions?

THE COURT: Yes. I am granting a judgment—a dismissal with prejudice and a summary judgment dismissing and action both radiate the same identical odor. The difference is purely analogical.

MR. GERASH: And the Court considered the Televue case?

THE COURT: I read that. I don't think it supports your view, but if it does I am not going to follow it.

MR. GERASH: I would like to have ten days to file Motion for re-hearing.

THE COURT: You can have that, but it should follow the ten days after the Order is finally entered and signed. I believe you have that under the law without asking for it.

MR. GERASH: All right. Thank you, Your Honor.

THE COURT: And we will start your ten days in any event from the time you receive notice that the Order has been entered. I will see that you get a carbon copy of the Order which is finally signed and entered by the Court.

MR. GERASH: All right, Your Honor.

* * * *

(2) Petitioners' Motion for Rehearing in the District Court for the County of Routt:

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF ROUTT
STATE OF COLORADO

Civil Action No. 3741

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation, and YAMPA VALLEY ELECTRIC ASSOCIATION, INC., a Colorado corporation,
Defendants.

MOTION FOR RE-HEARING

COME NOW the above named Plaintiffs, by and through their attorneys, WALTER L. GERASH and JOHN S. CARROLL, and move that this Honorable Court order a re-hearing in the above captioned case.

AS GROUNDS FOR THIS MOTION, Plaintiffs state:

1. The Court erred as a matter of law in granting defendants' Motion for Summary Judgment, based on the application of Rule 41(a)(1) of the Colorado Rules of Civil Procedure in that two of the defendants filed Motions to Dismiss with accompanying affidavits and exhibits containing matters outside the scope of the pleadings, in conformity with Rule 12(b)(5), which in essence were motions for summary judgments (and indeed the Court found them to be such) which made the plaintiffs' Notice of Dismissal a nullity as it was filed after the motions for summary judgment.

2. The Court erred in granting defendants' Motion for Summary Judgment in that plaintiffs' Notice of Dismissal was filed in the District Court in and for the City and County of Denver on December 8, 1964, in that venue had changed to Routt County on October 23, 1964, thus making the notice of dismissal ineffective and void under Colorado law.

3. The Court erred in granting defendants' Motion for Summary Judgment based on Rule 41(a)(1) in that defendants filed Motions for Summary Judgment, based on Rule 12(b)(6), in the United States District Court before plaintiffs attempted to file a Notice of Dismissal, thus the alleged second dismissal did not take place in the Federal Court for the same reasons stated in paragraph 1 above. Further there is a hearing pending in the Federal Court to test the validity of the attempted dismissal.

4. The Court erred in granting the defendants' motion for summary judgment in that in the attempted Notice of Dismissal in the United States District Court, an order was signed dismissing the case pursuant to Rule 41(a)(2), and therefore not subject to the terms of Rule 41(a)(1).

5. The Court erred in granting defendants' motion for Summary Judgment in that by the very nature of the caption of the pleadings and by way of a motion with accompanying affidavits, filed by the defendants concerning lack of diversity in the United States District Court, the United States District Court did not have jurisdiction *ab initio* there being a lack of diversity of citizenship and plaintiffs could not file an effective notice of dismissal if there was no jurisdiction.

6. The Court erred when it granted defendants' Motion for Summary Judgment based on Rule 41(a)(1), i.e. the "double dismissal" rule since the validity of the attempted voluntary Federal dismissal is still pending and has not been ruled upon. The only action this Court could take (and wrongly) would be to uphold the voluntary dismissal without prejudice.

7. The Court erred in denying the plaintiffs' Motion to Set Aside or Vacate the Plaintiffs' Attempted Voluntary Dismissal, there being good cause shown in law and equity and for the reasons alleged above.

8. The Court erred as a matter of law when it granted the Motion for Summary Judgment of Morrison-Knudsen Company, Inc., based on the exclusive remedy of the Workmen's Compensation law, which is unconstitutional.

9. The Court erred as a matter of law when it granted Colorado-Ute Electric Association, Inc.'s Motion for Summary Judgment based on the exclusive remedy of the Workmen's Compensation Law, which is unconstitutional.

WHEREFORE, Plaintiffs pray that this Honorable Court reinstate the law suit or vacate the attempted voluntary dismissal or grant a re-hearing in the above captioned case, and for such further relief as the Court may deem proper.

WALTER L. GERASH
and JOHN S. CARROLL
By */s/ Walter L. Gerash*

Attorneys for Plaintiffs
Suite 508, 1700 Broadway
Denver, Colorado 80202

Telephone 825-1414, 825-1462.

(3) Petitioners' Opening Brief in the Supreme Court of Colorado, pp. 27-28:

No. 22018

IN THE SUPREME COURT
OF THE STATE OF COLORADO

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs in Error,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado Corporation, et al.,
Defendants in Error.

Error to the District Court in and for
the County of Routt, State of Colorado
Honorable Addison M. Gooding, Judge

OPENING BRIEF OF PLAINTIFFS IN ERROR

* * *

3. THE COURT ERRED BY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE TWO DISMISSAL RULE, AS THERE HAS BEEN NO JUDICIAL DETERMINATION OF THE VALIDITY OF THE NOTICE OF DISMISSAL IN THE FEDERAL COURT.

The defendants' final Motion for Summary Judgment has no valid grounds for support. There has been no determination whatever of the merits of this controversy. There has been no effective dismissal to date in any court. The U.S. District Court's Order indicates that it is reluctant to rule until the state court rules. There can be no summary judgment to invoke the "double dismissal" rule since it has not been determined that there was an effective dismissal in the U.S. District Court. The court ordered that all proceedings in the federal action are stayed until a final determination is made by the state court as to the notice of dismissal there. The Motion for Summary Judgment must fail based on the two dismissal rule, even assuming the State court might resolve the fact that there was a voluntary state dismissal! How can the Routt County Court also say there was an effective federal dismissal when the Federal Court has not as yet ruled factually if there has been a valid voluntary dismissal under Rule 41(a)(1)?

There are also other Federal factual and legal questions to be determined by the Federal Trial Court. There is the jurisdictional question i.e. whether the Federal Court had jurisdiction *ab initio*. These are issues that have not been determined by the Federal Court. How can the Honorable Court in Routt County abrogate unto itself the double power to settle these pending federal issues and throw the horribly injured plaintiff out of court ON THE MERITS?

• • •

(4) Petitioners' Reply Brief in the Supreme Court of Colorado, pp. 5-10, 15:

No. 22018

IN THE SUPREME COURT
OF THE STATE OF COLORADO

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs in Error,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation, et al.,
Defendants in Error.

Error to the District Court in and for
the County of Routt, State of Colorado
Honorable Addison M. Gooding, Judge

• • •

REPLY BRIEF OF PLAINTIFFS IN ERROR

III.

Argument

I. THE COURT ERRED WHEN IT IMPOSED THE DRASTIC "DOUBLE DISMISSAL" RULE SINCE MOTIONS FOR SUMMARY JUDGMENT WERE FILED BY THE DEFENDANTS PRIOR TO THE PLAINTIFFS' ATTEMPTED VOLUNTARY DISMISSAL IN BOTH THE STATE AND FEDERAL COURTS.

The "double dismissal" rule as set forth in Rule 41(a)(1) of the *Colo.R.Civ.P.* is as follows:

> "(a) Voluntary Dismissal: Effect Thereof.
>
> "(1) By Plaintiff; By Stipulation. Subject to the provisions of rule 23(c), of rule 66, and of any statute, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim."

Rule 41(a)(1) of the *F.R.Civ.P.* is basically the same.

Rule 12(b)(5) of the *Colo.R.Civ.P.* states the following:

> "If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56."

Rule 12(b)(6) of the *F.R.Civ.P.* is similar.

In the state court proceedings Morrison-Knudsen and Colorado-Ute filed Rule 12(b)(5) motions to dismiss and presented matters outside the pleadings, namely, affidavits. (30-42; 69-80; 43-50 and Supp. Record) In the federal court action Morrison-Knudsen filed a Rule 12(b)(6) motion to dismiss and presented matters outside the pleadings, that is, affidavits. (Supp. Record) Further, Colorado Ute filed a motion to dismiss.[1] (Supp. Record)

In accordance with *Colo.R.Civ.P.* 12(b)(5) and *F.R. Civ.P.* 12(b)(6) the motions "*shall* be treated as one for summary judgment." (Emphasis added.) In both the state and federal actions the notices of dismissal were not filed before service of the motions for summary judgment. Therefore, the notices of dismissal were ineffective.

The authorities cited by defendants are not applicable here because they do not involve the circumstances of the case at bar; that is, they do not involve cases wherein Rule 12(b)(5), *Colo.R.Civ.P.*, or Rule 12(b)(6), *F.R.Civ.P.*, mo-

[1]The motion was not accompanied by extraneous matter. However, "we see no logical reason for differentiating a motion for summary judgment, a motion to dismiss for failure to state a claim accompanied by extraneous matter and a motion to dismiss for failure to state a claim not accompanied by extraneous matter—at least for the purposes of Rule 41(a)." **Tele-Views News Co. v S.R.B. T.V. Publ. Co.**, 28 F.R.D. 303, 308 (E.D. Pa. 1961).

tions were filed supported with matters outside the pleadings, before a notice of dismissal was filed.

In *Tele-Views, supra,* plaintiff commenced an action in a federal court in Illinois. Triangle, one of the defendants, filed a motion to dismiss for failure to state a claim and a motion to transfer the suit to a federal court in Pennsylvania. The motion to transfer was granted. Thereafter, plaintiff filed in the federal court in Illinois a notice of voluntary dismissal. Triangle filed a motion to vacate the notice of dismissal. The Illinois federal court did not decide either the motion to dismiss for failure to state a claim or the validity of the notice of dismissal.

In this posture, the case came to the federal court in Pennsylvania. Meanwhile, plaintiff filed the identical suit in a federal court in Iowa. Defendant Triangle moved the Pennsylvania federal court to enjoin plaintiff from proceeding with the suit in Iowa until the Pennsylvania case was decided. The Pennsylvania federal court held that although the action transferred to Pennsylvania federal court was commenced prior to the case pending in Iowa, the action transferred to Pennsylvania was effectively dismissed by plaintiff when it filed its notice of voluntary dismissal in the Illinois federal court. Therefore, the federal court in Pennsylvania had no jurisdiction over the parties.

However, on Triangle's motion for reargument, the court held that the case was validly tranferred to the federal court in Pennsylvania and that the court had jurisdiction. The court stated as follows:

> "We think that a motion to dismiss for failure to state a claim upon which relief can be granted should be regarded as the equivalent of a motion for sum-

mary judgment for the purposes of applying Rule 41(a).

"....

"We now hold that since the notice of voluntary dismissal was filed subsequent to the defendant's service of a motion, the equivalent of a motion for summary judgment, the plaintiff's notice of dismissal was a nullity." (Emphasis added.) *Id. at* 307-308.

We submit that the reasoning contained in *Tele-Views* is applicable in this action.

Here, the notice of dismissal was filed in the state court subsequent to the motions to dismiss filed by Morrison-Knudsen and Colorado-Ute. Therefore, the notice of dismissal was a nullity. In the federal court the attempted dismissal was filed subsequent to the motion to dismiss filed by Morrison-Knudsen and Colorado-Ute. Therefore, the attempted voluntary dismissal was also a nullity.[2]

* * * *

3. THE COURT ERRED BY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE TWO DISMISSAL RULE, AS THERE HAS BEEN NO JUDICIAL DETERMINATION OF THE VALIDITY OF THE NOTICE OF DISMISSAL IN THE FEDERAL COURT.

The defendants contend that all that remains for the federal court to do is to pass upon their motion for an order dismissing the action pursuant to Rule 41(a)(1) of

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[2]Further, we contend that the "double dismissal" rule of Rule 41(a)(1) is not applicable because the federal court entered an order of dismissal pursuant to Rule 41(a)(2).

F.R.Civ.P.[3] However, our motion to vacate or set aside plaintiffs' attempted dismissal is also still pending and undisposed of. It is our position that since the federal court has not determined the validity of the federal court dismissal, the district court in Routt County could not properly determine any federal dismissal.

• • • •

(5) Petitioners' Petition for Rehearing in the Supreme Court of Colorado:

IN THE SUPREME COURT
OF THE STATE OF COLORADO

No. 22018

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs in Error,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation, and YAMPA VALLEY ELECTRIC ASSOCIATION, INC., a Colorado corporation, *Defendants in Error.*

Error to the District Court of Routt County
Honorable Addison M. Gooding, Judge

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[3]See **Brief for Morrison-Knudsen**, p. 15, **Brief for Colorado-Ute**, p. 24, and **Brief for Yampa**, p. 43.

PETITION FOR REHEARING

WALTER L. GERASH
JOHN S. CARROLL
E. MICHAEL CANGES
EARL S. WYLDER

1700 Broadway
Denver, Colorado 80202
Telephone: 222-8973

Attorneys for Plaintiffs in Error

The plaintiffs in error respectfully petition the Supreme Court for an Order granting them a rehearing.

AS GROUNDS FOR THIS PETITION, they show the Court that:

(1) The Court asumed that the United States District Court for the District of Colorado had dismissed the action in that court pursuant to *F.R.Civ.P.* 41(a)(1) whereas the dismissal in that court, if any, was pursuant to *F.R.Civ.P.* 41(a)(1)(2).

(2) In fact, the action in the United States District Court for the District of Colorado is still pending, the United States District Court having invoked the doctrine of abstention.

(3) The "dismissal" in the United States District Court for the District of Colorado was no more than a confession of a motion to dismiss filed in the United States District Court for the District of Colorado by the defendants in error. In that motion to dismiss, the defend-

ants in error correctly pointed out that the United States District Court lacked jurisdiction because there was not complete diversity of citizenship. Since in fact there was not complete diversity of citizenship, the United States District Court for the District of Colorado never had any jurisdiction and necessarily would have ultimately granted that motion to dismiss or would have dismissed on its own motion. A confession of a motion to dismiss or even a dismissal, whether pursuant to *F.R.Civ.P.* 41(a)(1) or pursuant to *F.R.Civ P.* 41(a)(2), is not within the double dismissal rule *when there never was any jurisdiction in the federal court.*

(4) The Supreme Court of Colorado indeed would have the duty to rule on the status of the state case and the effect of a purported dismissal in the state case. The Supreme Court of Colorado should not have ruled on the status of the federal case and the effect of a dismissal, if any, or other pleading in the federal case.

(5) The Supreme Court of Colorado should itself invoke the doctrine of abstention and allow the federal court to rule on the applicability of *F.R.Civ.P.* 41(a)(1) and on other federal issues that are properly before the federal court.

(6) Application of the double dismissal rule in these circumstances is contrary to Rule 1 of the *Colo.R.Civ.P.* and is a denial of the due process of law guaranteed by the *U.S.Const.* Amend. 5, *U.S.Const.* Amend. 14, and *Colo. Const.* Art. II §§3, 6 and 25.

(7) The plaintiffs in error neither briefed nor argued the question whether the Workmen's Compensation Act is the exclusive remedy *vis-a-vis* MORRISON-KNUDSEN COMPANY, INC. and COLORADO-UTE ELECTRIC ASSOCIATION, INC. because the trial court stated that

its dismissal on the ground of the double dismissal rule and that its remarks about the applicability of *CRS* (1963) 81-3-2 were dicta. There are cogent constitutional reasons why *CRS* (1963) 81-3-2 does not apply. The plaintiffs in error respectfully request leave to brief and argue these constitutional reasons.

(8) The amendment to *CRS* (1953) 81-9-2 mentioned by the Court [Colo.Laws (1963) c.180 §4] did not become effective on April 18, 1963 as indicated by the court but instead became effective ninety days later by virtue of *Colo.Const.* Art. V §1 (notwithstanding the safety clause in the act).

(9) *Colo.R.Civ.P.* 41(a)(1) does not have the same meaning as *F.R.Civ.P.* 41(a)(1). *Colo.R.Civ.P.* 41(a)(1) clearly applies to double dismissals only in state courts and not to a situation of one dismissal in a state court and one dismissal in a federal court. *F.R.Civ.P.* 41(a)(1), however, does apply to the situation of one dismissal in a state court and one dismissal in a federal court. Since the language of the Colorado rule and of the federal rule is not identical, these rules have different meanings, and the Colorado rule of double dismissal applies to double dismissals in state courts and not to the situation of one dismissal in a state court and one dismissal in a federal court.

/s/ Walter L. Gerash
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Attorneys for Plaintiffs in Error

(6) Petitioners' Motion to Vacate or Set Aside Plaintiffs' Dismissal under Rule 41(a)(1) Previously Filed Herein, and to Dismiss the Case on Defendants' Motion to Dismiss for Lack of Jurisdiction due to Lack of Diversity, Nunc Pro Tunc, in the United States District Court for the District of Colorado:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 8904

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs,

vs.

MORRISON-KNUDSEN COMPANY, et al, *Defendants.*

MOTION TO VACATE OR SET ASIDE PLAINTIFFS' DISMISSAL UNDER RULE 41(a)(1) PREVIOUSLY FILED HEREIN, and TO DISMISS THE CASE ON DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION DUE TO LACK OF DIVERSITY, NUNC PRO TUNC.

COME NOW the above named Plaintiffs, by and through their attorneys, Walter L. Gerash and John S. Carroll, and move that this Honorable Court allow Plaintiffs to vacate, set aside and hold for nought the Notice of Dismissal filed herein and to dismiss the case for lack of jurisdiction nunc pro tunc and as grounds for this Motion state:

1. This Court did not have jurisdiction in the first instance because as soon as Motions to dismiss for want

of jurisdiction with the accompanying Affidavits were filed by the pertinent defendants it was clear that there was a lack of complete diversity of citizenship between the adverse parties, which indeed was the sole reason that prompted Plaintiffs to file their immediate Notice of Dismissal, so as not to incur further expense and delay on behalf of all the parties involved.

2. These Plaintiffs were powerless to file a voluntary dismissal pursuant to Rule 41(a)(1), *Fed.R.Civ.P.*, in that one of the Defendants had previously filed and served a Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), and in support thereof submitted a Memorandum Brief and affidavits; and that said Motion could have been treated as a Motion for summary judgment pursuant to Rule 12(b), and as a result thereof, the voluntary dismissal of the Plaintiffs was not timely filed and is therefore a nullity of no force and effect.

3. Subsequent to Plaintiffs' Notice of Voluntary Dismissal, Defendants have filed what is designated as a "Motion under Rule 41(a)(1) for an Order Dismissing Plaintiffs' Complaint With Prejudice and for an Adjudication of Merits in Favor of Defendant", when in fact there has not been a determination by the District Court for the County of Routt, State of Colorado, as to the validity of Plaintiff's Voluntary Dismissal in that Court, and in fact one of the Defendants has filed therein an Answer and a speaking Motion contained in its Memorandum Brief indicating the invalidity of Plaintiffs' Notice of Voluntary Dismissal as more fully shown by Defendant Yampa Valley Electric Association, Inc.'s Answer and Memorandum Brief filed in said action, copies of which are attached hereto as Exhibits A & B. Plain-

tiffs have filed a confession of the speaking motion of said Defendant Yampa Valley Electric Association Inc.'s Brief in The District Court for the County of Routt, State of Colorado. A copy of said Confession is attached to this Motion as Exhibit "C". In view of the fact that there has been no dismissal in the said District Court for the County of Routt, State of Colorado, Defendants cannot invoke what is commonly referred to as the double dismissal rule under Rule 41(a)(1), and any relief by this Court may be only pursuant to Rule 41(a)(2).

4. This Court has wide discretion in a motion to vacate or set aside the dismissal of the second action, to take a view of the whole picture of the situation presented and determine the case upon justice and equity.

5. This Motion is filed promptly within ten days and by allowing Plaintiffs to withdraw the said Notice of Voluntary Dismissal, will not prejudice the Defendants and will prevent the harsh results of the possible operation of the "double dismissal" rule, namely, Plaintiffs' claim for relief based on Mr. Alexander's catastrophic injuries, to wit, severe dismemberment of both legs just below the knee and one arm at the shoulder. It will serve the interests of justice and equity, as this case will be dismissed either under Rule 41(a)(2) or nunc pro tunc for want of jurisdiction over the subject matter in that there is no complete diversity of citizenship among the parties.

6. Plaintiffs have an inherent right to confess Defendants' Motion to Dismiss with the accompanying Affidavits attached thereto which clearly showed that there was a lack of complete diversity of citizenship, and hence this Court did not have jurisdiction in the first instance to entertain any motions and thus not prejudicing the Plaintiffs or any other parties by the possible invoking

of a harsh rule that is not meant to be applied in this case.

WHEREFORE, Plaintiffs pray that this Honorable Court allow Plaintiffs to set aside or vacate the voluntary dismissal heretofore filed herein, or in the alternative to hold for nought Plaintiffs' voluntary dismissal heretofore filed herein under Rule 41(a)(1) and if such dismissal be allowed by this Honorable Court it be made pursuant to Rule 41(a)(2) or on the grounds that this Court has no jurisdiction over the persons and subject matter of the action due to the lack of complete diversity of citizenship, nunc pro tunc, as fully shown by the Defendants' Motion and Affidavits attached thereto.

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(7) Order dated April 22, 1965, in the United States District Court for the District of Colorado:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

LEWIS M. ALEXANDER and RUTH M. ALEXANDER,
Plaintiffs,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Delaware corporation; COLORADO-UTE ELECTRIC ASSOCIATION, INC., a Colorado corporation, and YAMPA VALLEY ELECTRIC ASSOCIATION, INC., a Colorado corporation,
Defendants.

Civil Action No. 8904

ORDER

Plaintiffs filed herein a voluntary dismissal of this action under Rule 41(a)(1). The Court thereupon entered an order dismissing the action without prejudice.

The defendants have moved for an order of this court dismissing the action with prejudice. Defendants allege that prior to the institution of this action the plaintiffs had instituted a similar action in the Denver District Court and had voluntarily dismissed it. Defendants invoke the latter part of Rule 41(a)(1), which states "that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

The plaintiffs oppose the motion and the parties have filed briefs in support of and in opposition to their respective positions.

From the briefs it appears that the plaintiffs, prior to the institution of the action in this court, tendered to the Clerk of the Denver District Court for filing a voluntary dismissal pursuant to Rule 41(a)(1) of the Colorado Rules of Civil Procedure, and that the Clerk did file it on December 8, 1964.

The effect of this tender and filing is in dispute. The defendants contend that the effect was a voluntary dismissal of the action without prejudice. Plaintiffs contend it did not effect a dismissal of the action because (among other reasons) on October 2, 1964, the Denver District Court had granted a motion for a change of venue to the

District Court of Routt County, and consequently, on December 8 the Denver District Court had no jurisdiction of the action and the filing of the notice of dismissal did not effect a dismissal. In their briefs the plaintiffs also argue that there was no dismissal on the grounds of estoppel and waiver.

It is apparent that the dismissal or non-dismissal of the state action is a key question in determining whether or not the plaintiffs can proceed with this litigation.

The determination of the dismissal or non-dismissal of the state action necessarily must be determined by state law, specifically the application of the Colorado Rules of Civil Procedure, in the light of all pertinent facts.

If this Court determines the question of dismissal or non-dismissal of the state action, it must apply Colorado law if that law is established, or if not, this Court must make its best educated guess as to what the courts of Colorado would declare the law to be.

There appears no necessity for the law of Colorado to be determined secondhand in this particular case, for in the pending state action a Colorado court can determine the Colorado law and its application to the case now before it.

This Court is most reluctant to determine a question of state law when that determination may be dispositive of litigation pending in a state court.

For the foregoing reasons the Court called counsel into conference and expressed the Court's feeling that this was a matter in which the doctrine of abstention should be

invoked to give the state court an opportunity to determine the question of dismissal or non-dismissal of the state proceedings. Counsel expressed concurrence.

IT IS THEREFORE ORDERED that all proceedings in this action are hereby stayed until the further order of this court to give the parties to this action an opportunity to obtain a determination by the courts of Colorado of the status of the litigation in the state court.

IT IS FURTHER ORDERED by the Court that this Court retain jurisdiction of this matter for such further proceedings as this Court may deem appropriate.

DATED at Denver, Colorado, this 22nd day of April, 1965.

BY THE COURT:

/s/ Hatfield Chilson
HATFIELD CHILSON, Judge
United States District Court